Supreme Court, U.S.
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No. 09- 1 0 - 8

IN THE

Supreme Court of the United States

EUGENE IOVINE, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

WHETHER, CONSISTENT WITH 29 U.S.C. § 153(b) AND THIS COURT'S OPINION IN *NEW PROCESS STEEL, L.P. v. N.L.R.B.*, 560 U.S. __ (NO. 08-1457, DECIDED JUNE 17, 2010), FOLLOWING A DELEGATION OF THE NATIONAL LABOR RELATIONS BOARD'S POWERS TO A THREE MEMBER GROUP, TWO MEMBERS MAY CONTINUE TO EXERCISE THAT DELEGATED AUTHORITY ONCE THE GROUP'S (AND THE BOARD'S) MEMBERSHIP FALLS TO TWO.

CORPORATE DISCLOSURE STATEMENT REQUIRED BY RULE 29.6

Eugene Iovine, Inc., has no parent corporation. No publicly held company owns 10% or more of Eugene Iovine, Inc.'s stock.

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RULE

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PETITION FOR A WRIT OF CERTIORARI

Eugene Iovine, Inc. respectfully petitions for a writ of certiorari to the United States Court of Appeals for the Second Circuit to review that court's summary order in *National Labor Relations Board v. Eugene Iovine, Inc.*, No. 09-0217-ag (March 30, 2010).

CITATIONS OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS BELOW

The Summary Order of the United States Court of Appeals for the Second Circuit (App. 1a-7a) is unofficially reported at 2010 U.S. App. LEXIS 6504, and may be accessed on the court of appeals' website, *www.ca2.uscourts.gov* (links to "Decisions" and "Summary Orders")[1].

The Supplemental Decision and Order of the National Labor Relations Board (App. 8a-18a) is officially reported at 353 N.L.R.B. No. 36. Not yet published in official Board volumes, the Decision and Order may be accessed at the agency's website, *www.nlrb.gov* (links to Board "Decisions"). It is published unofficially at 185 L.R.R.M. (BNA) 1137. (These reports include the Supplemental Decision of the Board's administrative law judge.)

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[1] The Second Circuit's Local Rules state that "Rulings by summary order do not have precedential effect." 2d Cir. R. § 32.1.1.

BASIS FOR THIS COURT'S JURISDICTION

The Summary Order of the court of appeals was entered March 30, 2010. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED

National Labor Relations Act, 29 U.S.C. § 151, *et seq.*

Section 3(b), in relevant part, provides:

> The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise . . . . A vacancy in the board shall not impair the right of the remaining members to exercise all of the powers of the board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group, designated pursuant to the first sentence hereof.

29 U.S.C. §153(b).

STATEMENT OF THE CASE

INTRODUCTION

This petition raises for the Court's consideration the same question as the Court has just decided in *New Process Steel, L.P. v. N.L.R.B.*, 560 U.S. __ (No. 08-1457, June 17, 2010): "whether, following a delegation of the [National Labor Relations] Board's powers to a three-member group, two members may continue to exercise that delegated authority once the group's (and the Board's) membership falls to two." *Id.*, slip. op. at 1. The Court held the remaining two members could not exercise such authority. *Id.* This case should be resolved in a like manner.

JURISDICTION IN THE COURT OF APPEALS

The case was heard before the court of appeals pursuant to Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e).

PROCEEDINGS BELOW

Upon unfair labor practice charges filed by Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO ("Local 3" or "the Union"), the National Labor Relations Board's (hereinafter, "the Board" or "the N.L.R.B.") General Counsel, pursuant to Section 3(d) of the National Labor Relations Act, 29 U.S.C. § 151, 153(d), ("NLRA" or "the Act"), issued two consolidated administrative complaints, alleging that Iovine had violated Sections 8(a)(5) and (1) of the Act, by laying off employees represented by Local 3 on

various dates between December 1996 and May 1998, without giving the Union sufficient and timely notice to afford it a meaningful opportunity to bargain over the layoffs. (A. 20a). Iovine denied any violation. (A. 30a, 42a, 46a). Following an evidentiary hearing, administrative law judge ("ALJ" or "Judge") David I. Goldman found that Iovine had violated the Act, as alleged. (A. 19a-59a).[2] Iovine filed exceptions to the judge's decision (A. 8a). The Board affirmed the judge's decision, with certain modifications not relevant here (A. 9a-10a).

The Board petitioned for enforcement of its order. 29 U.S.C. § 160(e). The court of appeals granted the Board's petition (A. 1a-2a). The court in its Summary Order rejected each of Iovine's assignments of error, including its argument that the Board had no authority to decide the case because it lacked a quorum. (A. 3a).

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[2] The case was heard by ALJ Howard Edelman. After exceptions were filed to his decision finding that Iovine had violated sections 8(a)(5) and (1) of the Act, but before the Board had acted, Iovine requested that the case be remanded for a new hearing and decision before another judge because ALJ Edelman had created an appearance of partiality by copying extensively from the NLRB General Counsel's brief in his decision. Pursuant to its decision in *Dish Network Servs. Corp.*, 345 NLRB 1071 (2005), the Board set aside Judge Edelman's decision and remanded the case to the Chief ALJ for assignment to a different judge to review the record and issue a reasoned decision. *Eugene Iovine, Inc.*, 347 NLRB 258 (2006). This remand resulted in Judge Goldman's Supplemental Decision ("decision"). Upon Iovine's exceptions to this decision, the Board issued its Supplemental Decision and Order which led to this petition.

Iovine seeks review of the court of appeals' determination that the Board's Decision and Order were issued lawfully.

FACTS CONCERNING THE BOARD "QUORUM" ISSUE

This case presents for review the same issue as the Court decided in *New Process Steel, L.P. v. N.L.R.B.*, *supra*, p. 3. That the quorum issue deserved to be considered by the Court therefore already has been determined.[3] The result also is prescribed. It arises from the Board's nearly 600 decisions and orders in unfair labor practice and representation cases made with only two members sitting during the period January 2008 through April 2010. *New Process Steel*, *id.*, slip op. at 3[4]. *Eugene Iovine, Inc.* is one such case. At the time it was decided on September 30, 2008, only Chairman Schaumber and Member Liebman were Board members (A. 8a).

The language, meaning and history of Section 3(b) of the NLRA as well as the events leading to the Board's diminished membership in 2008 have been described in detail in *New Process Steel*. We therefore review them only briefly.

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[3] The Board in *New Process Steel* agreed that the Court should decide the issue. Brief for NLRB, filed September 29, 2009 at 8-9. *http://www.justice.gov/ar./briefs/2009/responses/2008-1459.response.pdf.*

[4] *See* Letter Brief for the N.L.R.B. in *New Process Steel*, dated April 26, 2010, at p. 1.

Section 3(b) has its roots in the original Wagner Act. The full Board then consisted of only three members. "A vacancy in the Board," the statute read, "shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum." Act of July 5, 1935, ch. 372, § 3(b), 49 Stat. 451.

The interpretative problem culminating in *New Process Steel* arose from changes made in the Taft-Hartley Act. Among other things, under Section 3(a), the Board's size grew to five members. Labor-Management Relations Act, 1947, ch. 120, § 101, 61 Stat. 139. Section 3(b) was amended, too. Also, the first sentence of 3(b) allowed the agency "to delegate to any group of three or members any or all of the powers which it may itself exercise. . . ." *Id.* The succeeding quorum provision also was changed so that "three members of the Board shall, at all times, constitute a quorum of the board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof." *Id.*

In December 2007, the Board had four members (Chairman Schaumber and Members Liebman, Kirsanow and Walsh), but two of the members were recess appointments whose terms were about to expire. On December 28, the four members delegated all of the Board's powers to a three member group (Chairman Schaumber and Members Liebman and Kirsanow). (A. 8a n. 1.). After the recess appointments of Members Kirsanow and Walsh expired shortly thereafter, the two remaining members (Chairman Schaumber and Member Liebman), purportedly acting as a quorum of

the three-member group, continued to issue decisions and orders in unfair labor practice and representation cases. *Ibid.* This situation continued until April 5 and 6, 2010, when recess appointees Craig Becker and Mark Gaston Pierce, respectively, joined now-Chairman Liebman and Member Schaumber on the Board.[5] These additions, restoring Board strength to four members, meant the agency clearly had enough members under Section 3(b) to decide cases. It brought to a close a 27-month period in which the Board, in Petitioner's view, lacked a quorum.

REASONS FOR GRANTING THE PETITION

In Light Of This Court's Decision In *New Process Steel*, this Court Should Decide Whether The NLRB Has Authority Under 29 U.S.C. § 153(b) To Decide Cases With Only Two Sitting Members.

As noted above, this case presents for review the same issue as the Court decided in *New Process Steel*, *supra* p. 3. On the authority of that decision, the Court should grant certiorari, reverse the judgment of the court of appeals, and remand the case for proceedings consistent with its recent decision.

The Court's decision in *New Process Steel* resolved a conflict in the circuits. 560 U.S. __, slip op. at 4, n.1. While the Seventh Circuit in *New Process Steel*,[6] as well as the Second Circuit in *Snell Island S.N.F. LLC v.*

[5] *See* NLRB Press Release, "New Board Members Take Office, Announces Chief Counsel," April 7, 2010. *http://www.nlrb.gov.about us/newsroom/index.aspx.*

[6] *New Process Steel, L.P. v. N.L.R.B.*, 564 F.3d 840 (2009).

N.L.R.B., 568 F.3d 410 (2d Cir. 2009), and the First Circuit in *Northeastern Land Services, Ltd., d/b/a The NLS Group v. N.L.R.B.*, 560 F.3d 36 (1st Cir. 2009), upheld the two-member Board's decision-making, the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), held that it violated the NLRA.[7]

The employers in *Snell Island*, *Northeastern Land Services*, *Narricot Industries* and *Teamsters Local Union No. 523*, as well as the Board in *Laurel Baye*, each has filed a petition for certiorari.[8] It appears that

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[7] Subsequently, the Fourth Circuit in *Narricot Industries, L.P., et al. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), *petition for cert. pending* (Nos. 09-1164,-1280, filed April 15, 2010), and the Tenth Circuit in *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2010), *petition for cert. pending* (No. 09-1404, filed May 17, 2010), also sustained the Board's authority to render decisions despite its depleted membership. The decisions of the First, Seventh and Fourth Circuits were based on the statutory language; the decisions of the Second and Tenth Circuits were based on a *Chevron* analysis, holding that although the language of section 3(b) and its legislation history were inconclusive, the Board's position that agency decisions could be rendered with only two members seated was "reasonable." See *Chevron U.S.A. v. National Resources Def. Council*, 467 U.S. 837 (1986).

[8] *See Snell Island*, 78 U.S.L.W. 3130 (filed Sept. 11, 2009; *Northeastern Land Services*, 78 U.S.L.W. 3098 (filed Aug. 18, 2009); *Narricot Industries*, 78 U.S.L.W. 3629 (filed April 15, 2010), *Teamsters Local Union No. 523*, 78 U.S.L.W. 3702 (filed May 17, 2010) and *Laurel Baye*, 78 U.S.L.W. 3185 (filed Sept. 29, 2009). The petition (together with the Board's brief) in *Snell Island* was distributed on December 2, 2009 for the Court's (Cont'd)

the Supreme Court intended to await the outcome in *New Process Steel* before addressing these other cases. This evidently accorded with the Board's wishes. *See e.g.*, Brief for the NLRB in *Snell Island* ("The petition for a writ of certiorari should be held pending the Court's decision in *New Process Steel* . . . and then should be disposed of accordingly." *Id.*, Conclusion, at p. 9)[9]. *www.justicegov/osg/briefs/2009/responses/2009-0328.resp.html.* The Court may dispose of this case in a summary manner also.

(Cont'd)
Conference of January 8, 2010 (S. Ct. No. 09-328); the petition (together with the Board's brief) in *Northeastern Land Services* was distributed on December 16, 2009 for the Court's conference of January 8, 2010 (S. Ct. No. 09-213); and the Board's petition (together with the respondent employer's brief in opposition and the respondent union's brief in opposition) in *Laurel Baye* was distributed on October 14, 2009 for the Court's Conference of October 30, 2009. (A reply brief for the NLRB was distributed on October 16.) (S. Ct. No. 09-3777). *See http://supremecourt.gov/search.aspx?filename=docketfiles. See also supra* n. 7.

[9] The NLRB in *New Process Steel* had agreed that the Supreme Court should resolve the quorum issue. In its response to the employer's petition for certiorari, the Board said: "The NLRB agrees with petitioner . . . that review by this Court is warranted because *this case presents a recurring question of substantial importance* regarding the authority of the Board to act and the validity of many of its orders, and the courts of appeals are in conflict on that question." Brief for the NLRB, filed September 29, 2009, at 8-9 (emphasis added). *http://www.justice.gov/org/briefs/2009/oresponses/2008-1457.response.pdf.*

The court of appeals dispatched Iovine's argument that the Board lacked a quorum in this case by referring to its decision in *Snell Island*. (A. 3a). Curiously, the court of appeals' decision in *Iovine* did not address this Court's then-pending consideration of *New Process Steel*[10], the petition for certiorari pending in *Snell Island* (without opposition from the NLRB to the Court's eventual consideration thereof), or the other cases in which Supreme Court review has been sought. Now, the court of appeals' reasoning in *Snell Island* has been rejected by this Court. It follows that its decision in *Iovine* also must yield. Cf. *N.L.R.B. v. Talmadge Park*, __ F.3d __ (No. 09-2601-ag, decided June 23, 2010) (recognizing that the Court's decision in *New Process Steel* has "overridden" the holding in *Snell Island*). The Board could not lawfully decide this case with only two members available to discharge its authority.

The disposition of Iovine's petition here should follow the outcome of *New Process Steel*. Having reversed and remanded the Seventh Circuit's decision, this Court should grant Iovine's petition, reverse the Second Circuit's Summary Order, and remand this case with instructions consistent with its decision in *New Process Steel*.

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[10] The oral argument in *New Process Steel* took place the day before oral argument was held in *Iovine* on March 24, 2010.

CONCLUSION

WHEREFORE, Petitioner prays that its petition for a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT FILED MARCH 30, 2010

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 09-0217-ag

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

EUGENE IOVINE, INC.,

Respondent.

PRESENT: ROBERT D. SACK, REENA RAGGI, PETER W. HALL, Circuit Judges.

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the National Labor Relations Board's petition for enforcement is GRANTED.

The National Labor Relations Board ("Board" or "NLRB") petitions for enforcement of its September 30, 2008 order ruling that respondent Eugene Iovine, Inc. ("Iovine"), violated sections 8(a)(1) and (5) of the National Labor Relations Act (the "NLRA" or "Act"), 29 U.S.C. §§ 158(a)(1), (5), by unilaterally firing employees without first providing their union with timely

notice and an opportunity to bargain over the layoffs. Iovine, an electrical contractor, opposes enforcement on the grounds that the Board (1) had no authority to decide the case because it lacked a quorum; (2) irrationally ignored evidence of Iovine's past practice of notifying an employee benefit fund following layoffs; (3) erred, in any event, in concluding that Iovine failed to provide timely notice to the union; and (4) imposed an arbitrary remedial order unwarranted by the alleged violation. We assume the parties' familiarity with the facts and record of prior proceedings, which we reference only as necessary to explain our decision to grant the Board's petition.

1. *Standards and Scope of Review*

Under our highly deferential review of NLRB orders, *see International Union, United Auto., Aerospace, and Agric. Implement Workers of Am. v. NLRB*, 520 F.3d 192, 196 (2d Cir. 2008), we uphold the Board's findings of fact "if supported by substantial evidence and [its] legal determinations if not arbitrary and capricious," *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d 336, 339 (2d Cir. 2008) (internal quotation marks omitted). Congress has delegated to the Board primary responsibility for determining the scope of an employer's statutory duty to bargain, and we will affirm the Board's statutory construction so long as it is "reasonably defensible." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979); *see also NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 89-90 (1995) (observing that we afford "a degree of legal leeway" to Board interpretations of NLRA).

Appendix A

Because the Board adopted the ALJ's findings of fact and conclusions of law in part, we review both the ALJ's opinion and the Board's. *See NLRB v. Special Touch Home Care Servs., Inc.*, 566 F.3d 292, 297 (2d Cir. 2009).

2. *Quorum Challenge*

Iovine's argument that the Board lacked the quorum necessary to issue a valid order is foreclosed by *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), in which this court held that two members of the Board may issue enforceable decisions. Here, as in *Snell*, two active Board members issued the challenged order, acting as a quorum of the three-member group to which the Board had previously delegated all of its powers, as permitted by the Act. *See* 29 U.S.C. § 153(b). Accordingly, we consider the merits of the Board's petition.

3. *The Alleged Violation and Iovine's Defenses*

a. *The Duty to Bargain*

It is well-established that where, as here, an employer and a representative union are negotiating toward a collective bargaining agreement pursuant to section 8(a)(5) of the NLRA, the employer may not "alter terms and conditions of employment without first giving notice to and conferring in good faith with the union." *Firch Baking Co. v. NLRB*, 479 F.2d 732, 735 (2d Cir. 1973). Such unilateral action "amount[s] to a refusal to

negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy." *NLRB v. Katz*, 369 U.S. 736, 747 (1962); *see also Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 186 (2d Cir. 1991) (observing that economically motivated action by employer that does not cause "change in basic business operations . . . is subject to mandatory bargaining"); *In re Tri-Tech Servs., Inc.*, 340 N.L.R.B. 894, 894 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain.").

b. *Past Practice Exception*

Iovine submits that the Board irrationally rejected its argument that an established practice of notifying a benefit fund administrator following layoffs relieved it of any obligation to provide advance notice to the Union. *See The Courier-Journal*, 342 N.L.R.B. 1093, 1094 (2004) (observing that "unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo - not a violation of Section 8(a)(5)"). We disagree. The Board concluded that "[a]bsent evidence of when or how frequently or under what circumstances the asserted unilateral layoffs occurred," *Eugene Iovine, Inc.*, 353 N.L.R.B. No. 36, 2008 NLRB LEXIS 338, *4 (Sept. 30, 2008), vague testimony from Iovine's president that the practice was in place from 1971 to 1998 was insufficient to demonstrate that "employees could reasonably expect [it] to continue or reoccur on a regular and consistent basis," *Sunoco*,

Inc., 349 N.L.R.B. 240, 244 (2007). This conclusion, grounded in the record, cannot be deemed irrational. *See Salmon Run Shopping Ctr. LLC v. NLRB*, 534 F.3d 108, 113 (2d Cir. 2008) (observing that reversal based on factual findings is warranted only if "no rational trier of fact could reach the conclusion drawn by the Board" (internal quotation marks omitted)).

c. *Timely Notice and Economic Necessity*

Iovine next submits that the notice it provided, generally within a week of each layoff, was sufficient to meet its obligations under the Act in light of the exigent circumstances beyond its control that caused the layoffs — specifically, inclement weather or last-minute logistical problems precluding electrical work at a given job site and requiring prompt action lest workers sit idle at high cost to the company. We are not persuaded. First, "[t]o be timely, the notice must be given sufficiently in advance of actual implementation of the change to allow a reasonable opportunity to bargain." *Ciba-Geigy Pharms. Div.*, 264 N.L.R.B. 1013, 1017 (1982); *see also In re Pontiac Osteopathic Hosp. & Int'l Union*, 336 N.L.R.B. 1021, 1023 (2001) (observing that notice must be provided under circumstances allowing "reasonable opportunity for counter arguments or proposals" (internal quotation marks omitted)). No such advance notice was provided in this case. Further, the business emergency exception to the Act's bar against unilateral employment action is limited to "extraordinary events," and, "[a]bsent a dire financial emergency, . . . economic events such as loss of significant accounts or contracts,

operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *Cibao Meat Prods., Inc. v. NLRB*, 547 F.3d at 340 (internal quotation marks omitted); *see also Duffy Tool & Stamping, L.L.C. v. NLRB*, 233 F.3d 995, 997 (7th Cir. 2000) (describing exception as requiring immediate action to "stave off disaster"). The record reveals no such extraordinary event or imminent disaster in this case.[1]

Accordingly, we conclude that the Board reasonably determined that Iovine violated sections 8(a)(1) and (5) of the Act by failing to provide adequate notice and an opportunity to bargain over the challenged layoffs.

4. *The Remedial Order*

Finally, Iovine submits that the Board's remedial order awarding back pay and reinstatement was unwarranted. We will overturn a remedy imposed by the Board only where it is proven to be "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. Fugazy*

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1. While Iovine was not relieved of its duty to provide adequate notice and an opportunity to bargain, employers facing circumstances such as those at issue here are not without recourse. Where exigent circumstances fall short of dire emergency but nevertheless require prompt action, "the amount of time and discussion required to meet a bargaining obligation" varies depending on the context. *RBE Elecs. of S.D., Inc.*, 320 N.L.R.B. 80, 82 (1995). Unilateral action is permitted once the parties reach impasse, and bargaining "need not be protracted." *Id.*

Cont'l Corp., 817 F.2d 979, 982 (2d Cir. 1987) (quoting *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 540 (1943)). We detect no departure from the purposes of the Act in the Board's order that Iovine compensate fired employees for earnings and other benefits lost as a result of the unlawful layoffs. *See, e.g., NLRB v. Mastro Plastics Corp.*, 354 F.2d 170, 175 (2d Cir. 1965).

We have considered all of Iovine's remaining arguments in opposition to the Board's petition and conclude that they are without merit. Accordingly, we GRANT the NLRB's application for enforcement of its September 30, 2008 order.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX B — SUPPLEMENTAL DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD DATED SEPTEMBER 30, 2008

Eugene Iovine, Inc. ***and*** **Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO.** Cases 29-CA-21052, 29-CA-21086, 29-CA-21840-3, 29-CA-21879-1, 29-CA-21879-2, and 29-CA-22030

September 30, 2008

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On August 31, 2006, Administrative Law Judge David I. Goldman issued the attached supplemental decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board[1] has considered the supplemental decision[2] and the record in light of the

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1. Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

2. See *Eugene Iovine, Inc.*, 347 NLRB 258 (2006) (remanding this case for further consideration).

exceptions and brief[3] and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt the recommended Order as modified and set forth in full below.[4]

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by laying off employees without providing the Union timely notice and an opportunity to bargain over the layoffs. In making that finding, the judge rejected the Respondent's affirmative defense that it was merely adhering to a consistent past practice of unilaterally implementing layoffs in response to work- or weather-

3. The Respondent has requested oral argument. The request is denied as the record, exceptions, and brief adequately present the issues and positions of the parties.

4. We shall modify the judge's recommended Order to conform to the Board's standard remedial language, see *Excel Container, Inc.*, 325 NLRB 17 (1997), and to correct the judge's inadvertent double listing of employees Mike Matone and Phil Spannagel. We shall substitute a new notice to conform to the Order as modified.

We also amend the judge's remedy in one respect. The judge's remedy provides for the calculation of backpay in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971). The unfair labor practice violations found here, however, involved disruptions of employment. Therefore, backpay shall be calculated in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950). See, e.g., *Pan American Grain Co.*, 343 NLRB 318, 344 (2004), enfd. in part 448 F.3d 465 (1st Cir. 2006); *Wilen Mfg. Co.*, 321 NLRB 1094, 1100 (1996).

related delays on its construction projects. We agree with the judge's rejection of that defense but only for the following reason.

The judge found that, even if the Respondent had a practice of unilaterally implementing layoffs prior to the Union's certification (in February 1993), the Respondent failed to establish that it had continued that practice over the nearly 4 years between the certification and the lay-offs at issue here, which began in December 1996. The Respondent's president testified that it had unilaterally laid off employees "from 1971 to when this issue arose in 1998." He offered few specifics, recounting only that such layoffs could have occurred as a result of inclement weather, failure of other trades to complete their work, and, in the case of the New York City transit authority, when it could not supply necessary flagman or work trains. Although he did not know the details of any of the layoffs at issue in this case, he testified that the lay-offs would have been for the same reasons as earlier ones.

The party asserting the existence of a past practice bears the burden of proof on the issue and the evidence must show that the practice occurred "with such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." *Sunoco, Inc.*, 349 NLRB 240, 244 (2007); *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB 349, 353 (2003), enfd. mem. 112 Fed. Appx. 65 (D.C. Cir. 2004). The record here falls short of such a showing. Absent evidence of when or how

frequently or under what circumstances the asserted unilateral layoffs occurred, both before and after February 1993, we cannot conclude that the Respondent has demonstrated that the challenged layoffs were permitted as a continuation of an established past practice. See *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999), enfd. mem. 1 Fed. Appx. 8 (2d Cir. 2001) (finding that the Respondent failed to provide sufficiently specific evidence to establish a past practice of reducing hours). In view of the foregoing, we find it unnecessary to pass on the judge's discussion of whether a past practice based on the acquiescence of a prior union can be relied on to unilaterally impose changes on a new union.[5]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Eugene Iovine, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Laying off employees for economic reasons in the bargaining unit represented exclusively by Local 3, International Brotherhood of Electrical Workers, AFL-

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5. In Member Liebman's view, the judge's discussion and resolution of that issue is fully consistent with Board precedent. See, e.g., *Eugene Iovine Inc.*, supra, 328 NLRB at 297.

CIO, without providing the Union timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff. The bargaining unit is:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field who are employed by employer-members of the United Electrical Contractors Association, a/k/a United Construction Contractors Association, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before laying off bargaining unit employees for economic reasons, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above over the layoff decision and its effects.

(b) Within 14 days from the date of this Order, to the extent that it has not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially

equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

William Alleyne	John Betancourt	Greg Stafford
Hugh Oakley	Peter Capasso	Lenford Anderson
Leslie Thomas	Mike Matone	Salvatore DePetro
Anthony Longo	Wayne Munyon	Clifford Pelzer
Charlie Sarullo	Phil Spannagel	William Grady
Gary Schulz	Ararson Medrano	Louis Cordero
Ed Wellington	Phil Nola	Russell Sausa
Allen Tu	Mario Thalassinos	John Siano
Jose LaSalle	Glen Lillibridge	Robert Lock
Edward Shane	Richard Zeller	Derrick Robinson

(c) Make whole the unit employees named above in subparagraph 2(b), and other similarly situated employees, for any loss of earnings and other benefits they may have suffered as a result of the Respondent's unlawful conduct, in the manner set forth in the remedy section of the judge's decision, as amended.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in

electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Farmingdale, New York copies of the attached notice marked "Appendix."[6] Copies of the notice on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 6, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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6. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Appendix B

Dated, Washington, D.C. September 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Appendix B

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off employees in the bargaining unit represented exclusively by Local 3, International Brotherhood of Electrical Workers, AFL-CIO for economic reasons without providing the Union timely notice and an opportunity to bargain about the decision

to lay off employees and its effects. The bargaining unit is:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field who are employed by employer-members of the United Electrical Contractors Association, a/k/a United Construction Contractors Association, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, before laying off bargaining unit employees for economic reasons, notify and, on request, bargain with the Union as the exclusive collective-bargaining representative of employees in the bargaining unit described above over the layoff decision and its effects.

WE WILL, within 14 days from the date of this Order, to the extent that we have not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially

equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

William Alleyne	John Betancourt	Greg Stafford
Hugh Oakley	Peter Capasso	Lenford Anderson
Leslie Thomas	Mike Matone	Salvatore DePetro
Anthony Longo	Wayne Munyon	Clifford Pelzer
Charlie Sarullo	Phil Spannagel	William Grady
Gary Schulz	Ararson Medrano	Louis Cordero
Ed Wellington	Phil Nola	Russell Sausa
Allen Tu	Mario Thalassinos	John Siano
Jose LaSalle	Glen Lillibridge	Robert Lock
Edward Shane	Richard Zeller	Derrick Robinson

WE WILL make the employees listed above, and other similarly situated employees, whole for any loss of earnings and other benefits suffered as a result of their unlaw-ful layoff, plus interest.

EUGENE IOVINE, INC.

Kathy Drew King, Esq., for the General Counsel.

Steven Goodman, Esq., of Woodbury, New York, for the Respondent.

Vincent McElroen, of Flushing, New York, for the Charging Party.

Appendix B

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

DAVID I. GOLDMAN, Administrative Law Judge. Pursuant to charges filed by Local Union No. 3, International Brotherhood of Electrical Workers (the Union or Local 3)[1] the Board's General Counsel issued a consolidated complaint on February 11, 1998 (GC Exh. 1(e)),[2] and a second consolidated complaint on October 27, 1998. (GC Exh. 1(gg).)[3] On September 20, 2001,the

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1. Except as noted herein, each charge was filed against Eugene Iovine, Inc. The original charge was filed in Case 29-CA-21052 on May 28, 1997. The charge in Case 29-CA-21086 was filed June 11, 1997. The charge in Case 29-CA-21840-3 was filed March 17, 1998, and the first amended charge in that case filed June 5, 1998. The charge in Case 29-CA-21840-4 was filed against Action Electric Co. on March 19, 1998, the first amended charge in that case filed June 5, 1998, and a request to withdraw the charge was approved by order dated March 14, 2001. The charge was filed in Case 29-CA-1858 against Gilston Electric Co. on March 25, 1998, and the first amended charge in that case filed June 5, 1998. A request to withdraw this charge was approved by order dated March 14, 2001. The charges were filed in Cases 29-CA-21879-1 and 29-CA-21879-2 on April 2, 1998. The charge was filed in Case 29-CA-22030 on May 20, 1998.

2. The February 11, 1998 consolidated complaint covered Cases 29-CA-21052 and 29-CA-21086.

3. The October 27, 1998 consolidated complaint covered Cases 29-CA-21858, 29-CA-21840-3, 29-CA-21879-1, 29-CA-21879-2, 29-CA-22030, and 29-CA-21840-4. Subsequently, by (Cont'd)

cases in the two consolidated complaints were consolidated for trial. (GC Exh. 1(11).)

The consolidated complaints allege that Respondent Eugene Iovine, Inc. (Iovine) laid off employees between December 1996 and May 1998 without providing Local 3—which was the employees' certified bargaining representative-sufficient and timely notice to afford the Union a meaningful opportunity to bargain with Iovine over the layoffs. This occurred notwithstanding that Local 3 and the employer bargaining association representing Respondent were engaged in collective-bargaining negotiations regarding Respondent's employees. Iovine's conduct is alleged to be violative of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent denies any violation of the Act.

This case was tried in Brooklyn, New York, on February 21, 2002, before Administrative Law Judge Howard Edelman. Judge Edelman issued his decision on April 17, 2002. On May 31, 2006, the Board remanded this case to the chief administrative law judge for reassignment to a different administrative law judge with the instruction to "review the record and issue a

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(Cont'd)

order dated March 14, 2001, a request to withdraw the charges in Cases 29-CA-21858 and 29-CA-21840-4 was approved and these cases were severed from this consolidated complaint. As a result of the severing of these cases, Respondents Gilston Electrical and Action Electrical were no longer respondents in this proceeding.

reasoned decision." *Eugene Iovine, Inc.*, 347 NLRB 258 (2006). On June 8, 2006, Chief Administrative Law Judge Robert A. Giannasi reassigned this case to me pursuant to the Board's remand. On the entire record and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Iovine, a corporation, provides electrical contracting services to other business firms and government entities at jobsites in the New York City area. Its principal place of business is in Farmingdale, New York. From there Iovine annually performs services in excess of $50,000 for various enterprises located in the State of New York, each of which, in turn, is directly engaged in interstate commerce. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I further find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. UNFAIR LABOR PRACTICES

Facts

Respondent performs electrical contracting primarily on public works projects within New York City. At all materials times Iovine has been a member of an employers' bargaining association known as the United

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Electrical Contractors Association or United Construction Contractors Association (the Association). The Association represents Iovine in collective bargaining with the Union representing Respondent's (and other Association-members) bargaining unit employees.

In approximately 1971, Iovine, along with and as a member of the Association, entered into a collective-bargaining contract with Local 363 of the International Brotherhood of Teamsters (Local 363). Local 363 represented Iovine bargaining unit employees for many years thereafter and was signatory to a succession of collective-bargaining agreements with the Association covering, among others, Iovine employees. Pursuant to those contracts, Iovine and Local 363 had an understanding that the layoff of employees did not require Iovine to notify Local 363 or to bargain over the decision to lay off employees, or over the effects of the layoff. The agreement with Local 363 was that in layoff situations Iovine's only notification obligation was to notify the benefit funds covering the laid-off employee. Iovine would do this by sending a card (e.g., R. Exh. 1) to the administrator of the Local 363 funds, which included a health and welfare fund, an annuity fund, a pension fund, and an education fund. At no time during the years that it represented Iovine employees did Local 363 ever request bargaining over layoffs.

After an October 18, 1989 election, Charging Party Local 3 was certified on February 23, 1993, as the collective-bargaining representative of the bargaining

unit employees of the Association's member employers, including Iovine. The bargaining unit consisted of:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field employed by the employer-members of [the Association], but excluding all office clerical employees, guards and supervisors defined in the Act.

The Association unsuccessfully challenged this certification and bargaining for a labor agreement commenced in October 1994. As of the date of the hearing in this case, no collective-bargaining agreement had been reached between the parties.

In December 1996 through May 1998 Respondent unilaterally laid off certain bargaining unit employees. On December 6, 1996, Respondent laid off employee William Alleyne. On January 3, 1997, Respondent laid off employee Hugh Oakley. Iovine did not provide the Union with notice (before or after the fact) of these layoffs. However, consistent with its practice maintained during its contractual relationship with the predecessor union Local 363, Iovine notified the Local 363 funds still applicable to and covering Oakley and Alleyne.

On December 19, 1997, Respondent laid off employee Leslie Thomas. Respondent concedes (R. Br. at 5 fn. 3) that no notice of Thomas' layoff was ever provided to the Union. Subsequently, the Union learned of the layoff and on March 30, 1998, requested that

Iovine meet to bargain regarding this lay-off. (GC Exh. 25.)

In the months after Alleyne and Oakley were laid off, charges were filed over the layoffs and Iovine learned that the Board's Regional Director intended to issue a complaint based on the charges. Without intending to prejudice its position that it had "no obligation to notify [the Union] concerning layoffs" (see, e.g., GC Exhs. 4, 8, 9 15, 17, 19, 21, and 24), Respondent altered its practice and began to provide notice of the layoffs to the Union after or in some cases as it laid off an employee. Thus, by letter dated January 12, 1998, Respondent (through counsel) advised the Union that employees Anthony Longo and Charlie Sarullo had been laid off the evening of January 9, 1998. By letter dated January 20, 1998, Respondent (through counsel) advised the Union that employees John Betancourt, Peter Capasso, Mike Matone, Wayne Munyon, Phil Spannagel, Greg Stafford, Lenford Anderson, Salvatore DePetro, and Clifford Pelzer had been laid off on January 16, 1998. By letter dated January 23, 1998, Respondent (through the Association) advised the Union that it had laid off employees William Grady, Gary Schulz, and Ed Wellington on January 23, 1998. On January 26, 1998, Respondent (through the Association) advised the Union that on January 16, 1998, it had laid off employees Allen Tu, Jose LaSalle, Edward Shane, Louis Cordero, and Ararson Medrano. By letter dated February 25, 1998, Respondent (through the Association) advised the Union that on February 20, 1998, it had laid off employee Phil Nola. By letter dated

March 16, 1998, Respondent (through the Association) advised the Union that on March 13, 1998, it had laid off employee Mario Thalassinos. On March 27, 1998, Respondent (through the Association) advised the Union that on March 27, 1998, it had laid off employees Glen Lillibridge and Richard Zeller. In a separate letter also dated March 27, 1998, Respondent notified the Union that on March 27, 1998, it had laid off employees Robert Lock, Mike Matone, Russell Sausa, John Siano, and Phil Spannagel. By letter dated May 19, 1998, Respondent advised the Union that on May 15, 1998, it had laid off employee Derrick Robinson.

In response to the layoff notices sent by Respondent, Local 3 requested bargaining regarding the layoffs and made information requests. (GC Exhs. 3, 6, 7, 16, 18, 20, 22, and 25.) Respondent's president, Eugene Iovine, testified that he understood that Local 3 wanted to bargain over the decision to lay off employees. (Tr. 89-90.)

Eugene Iovine testified that in the construction industry lay-offs may be economically warranted for a number of reasons that develop on short notice. For instance, this can happen when employees are working outside and inclement weather delays a job. In addition, Iovine described Respondent's electrical contracting work as a "following trade" which, he explained, was a trade that could begin its work on a project only once other trades, such as carpenters, plumbers, and HVAC workers had completed or reached certain stages in their work on a project. If the other trades failed to

complete their work on schedule that could mean that Respondent would not have work available as scheduled and Respondent might look to lay off employees. Iovine also described a problem that could arise if the New York City transit authority, a frequent project owner, did not supply flagmen or work trains as scheduled. In that case, Respondent could not perform its scheduled work and that might warrant layoffs.

The decision to lay off employees is made by the foreman on the job. As Respondent's counsel explained, "[T]here are a whole lot of factors that go into what causes layoffs at a construction site." (Tr. 39.) Generally, if employees arrive at work and find that a scheduled job is not ready, the foreman keeps the employees for the day and finds something for them to do until the job is ready. Based on the circumstances, the foreman will decide "whether they were coming back the next day, or the next week or whatever." (Tr. 94.) When jobs are temporarily shut down, sending employees to other worksites is a common alternative to layoffs.[4] If it appears that the scheduled job will not be ready for "any period of time," and there is no other work for employees, "the foreman would say, hey, they're not going to be back, I don't need them" and the foreman would call the office and initiate a layoff. (Tr. 86-87, 94.) Eugene Iovine could not recall the specific reasons for any of the lay-offs at issue in this case, but he agreed that they occurred because work was unavailable for one of the reasons described in his testimony. (Tr. 84-85.)

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4. *Eugene Iovine, Inc.*, 328 NLRB 294, 296, 297 (1999).

Appendix B

III. Discussion and Analysis

The general outline of the relevant law is well settled. During negotiations for a collective-bargaining agreement an employer may not make unilateral changes in mandatory subjects of bargaining without first bargaining to a valid impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). While negotiations for a collective-bargaining agreement are ongoing, "an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole." *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991) (footnote omitted), enfd. mem. 15 F.3d 1087 (9th Cir. 1994). "A bargaining impasse occurs when good-faith negotiations have exhausted the prospects of reaching an agreement. Good-faith bargaining requires timely notice and meaningful opportunity to bargain regarding the employer's proposed change, as no genuine bargaining can be conducted where the decision has already been made and implemented. Thus, no impasse is possible where an employer presents the union with a 'fait accompli' as to a matter over which bargaining to impasse is required." *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999) (citations omitted), enfd. granted in part and denied in part 233 F.3d 831 (4th Cir. 2000). Even when negotiations for a new collective-bargaining agreement are not in progress, an employer must give a union notice of an intended change sufficiently in advance to

permit an opportunity to bargain meaningfully about the change. *Bottom Line Enterprises*, supra; *Ciba-Geigy Pharmaceutical Division*, 264 NLRB 1013, 1017 (1982) ("To be timely, the notice must be given sufficiently in advance of the actual implementation of the change to allow a reasonable opportunity to bargain. However, if the notice is too short a time before implementation or because the employer has no intention of changing its mind, then the notice is nothing more than a fait accompli"), enfd. 722 F.2d 1120 (3d Cir. 1983). In sum, "an employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counterarguments or proposals." *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001), quoting *NLRB v. Citizens Hotel Co.*, 326 F.2d 501, 505 (5th Cir. 1964). *Toma Metals, Inc.*, 342 NLRB 787, 787 fn. 1 (2004) (announcement of layoffs on day they occurred does not satisfy duty to provide notice and opportunity to bargain).

The decision to lay off employees for economic reasons is a mandatory subject of bargaining, and therefore subject to the requirement of timely advance noticed required by the Act for good-faith bargaining to impasse. *McClain E-Z Pack, Inc.*, 342 NLRB 337 (2004) ("Decisions to conduct economically motivated layoffs are mandatory subjects of bargaining"); *Toma Metals, Inc.*, supra; *Tri-Tech, Services*, 340 NLRB 894, 895 (2003) ("It is well established that the layoff of unit employees is a change in terms and conditions of employment over which an employer must bargain"); *Ebenezer Rail Car Services*, 333 NLRB 167 (2001). As

the Seventh Circuit has explained, "Layoffs are not a management prerogative. They are a mandatory subject of collective bargaining. Until the modalities of layoff are established in the agreement, a company that wants to lay off employees must bargain over the matter with the union." *NLRB v. Advertisers Mfg., Co.*, 823 F.2d 1086, 1090 (7th Cir. 1987), enfg. in relevant part *Advertisers Mfg. Co.*, 280 NLRB 1185 (1986).

The effects of a layoff are also a mandatory subject of bargaining, largely without regard to the cause for the layoff. As with decisional bargaining, effects bargaining also requires an employer to provide the union with notice of layoffs before they occur in order to satisfy the employer's duty to bargain over the effects of the layoffs. *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000); *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021, 1021 fn. 8 (1994), enfd. 87 F.3d 1363 (D.C. Cir. 1996). The duty to bargain over the decision to lay off employees includes the duty to bargain over the effects of the layoffs. *Toma Metals*, supra, citing *Clements Wire*, 257 NLRB 1058, 1059 (1981).

Here, Respondent was engaged in collective bargaining with the Union for a new contract, but, not only did Respondent unilaterally implement layoffs without reaching an overall bargaining impasse, it did not provide the Union with notice of the layoffs sufficient to permit "a reasonable opportunity for counterarguments or proposals" prior to implementation. With regard to the layoffs of Alleyne (December 6, 1996); Oakley (January 3, 1997); and

Thomas (December 19, 1997); Respondent admits that it did not provide any notice to the Union. As to the subsequent layoffs on January 9, 1998 (Longo and Sarullo); January 16, 1998 (Betancourt, Capasso, Matone, Munyon, Spannagel, Stafford, Anderson, DePetro, Pelzer, Tu, LaSalle, Shane, Cordero, and Medrano); January 23 (Grady, Schulz, and Wellington); February 20, 1998 (Nola); March 13, 1998 (Thalassinos); March 27, 1998 (Lillibridge, Zeller, Lock, Matone, Sausa, Siano, and Spannagel); and May 15, 1998 (Robinson); the evidence shows, and I find that notice was provided to the Union (by Respondent or by the Association on its behalf) after the layoffs or in some cases the day that the layoffs occurred. Pursuant to the authorities discussed supra, it is clear that even at its best, Respondent's faxing of a notice to the Union the day that it laid off employees did not provide the Union with an opportunity for meaningful bargaining over the layoff decision or the effects of the layoff.

Respondent's Defenses

Iovine does not dispute the general applicability of the cited principles. However, Iovine contends that under the circumstances presented here, its conduct is not violative of the Act.

Respondent contends that it had no duty to bargain with Local 3 over the layoffs because its conduct was a continuation of the status quo undertaken pursuant to a longstanding past practice that it is privileged (and presumably Iovine believes it is *required*) to continue

until changed through collective bargaining. Respondent argues, very broadly, that "employer responses to economic conditions do not constitute a violation if consistent with past practice." Iovine relies on Board cases holding that, while a unilateral change in conditions of employment during negotiations is a violation of the Act, a "unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5)." *Courier Journal*, 342 NLRB 1093, 1094 (2004). In this regard, Respondent points out that from 1971 until Local 3 replaced Local 363 as the Iovine employees' collective-bargaining representative, the agreement and practice with Local 363 was that Iovine did not have to notify Local 363 or to bargain over layoffs.[5]

A difficulty with this argument is that if Respondent has shown such a past practice with Local 363, it has not shown one with Local 3, which is the union that has been the Iovine employees' certified collective-bargaining representative since February 1993, and recognized as such by Iovine since October 1994. In an earlier case involving these parties, *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), enfd. 1 Fed. Appx. 8 (2d Cir. 20001), the parties stipulated that Respondent's collective-bargaining relationship with Local 363 ended in 1992. 328 NLRB at 296. Respondent points out that there is

5. Although not expressly delineated, Iovine's contention that its practice was (and current obligation is) to provide no notice to the employees' union regarding layoffs indicates that its claim is that it is not obligated to engage in either decisional or effects bargaining over layoffs.

no evidence that Local 3 ever requested bargaining over layoffs prior to filing the charges in the instant cases, but, in fairness, there is no evidence that it needed to and the record is devoid of evidence from which a past practice regarding layoffs *with Local 3* can be established.[6] The layoffs at issue in this case occurred December 1996 through May 1998. Thus, Iovine relies upon a past practice, the evidence of which is nonexistent for the 2 years after its recognition of Local 3, for the 3-1/2 years since Local 3's certification, for 4 years since its collective-bargaining relationship ended with Local 363 (not to mention the 5 years since Local 3's selection by the bargaining unit employees). A past practice is not part of the "status quo" because it happened in the past, lay dormant, and an employer seeks to revive it to privilege unilateral changes undertaken years later.

Apart from the failure in this case to show a past practice with Local 3, there is the question of whether a past practice based on acquiescence of a predecessor union can be relied upon to impose unilateral changes on a new union. In *Courier Journal*, supra, the Board reaffirmed that a unionized employer's past practice of unilateral changes may constitute part of the status quo, and therefore an exception to the duty to bargain over unilateral changes. However, in doing so, the Board distinguished the situation of a past practice established

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6. I note that a past practice defense to an allegation of unlawful unilateral change is an affirmative defense as to which the respondent bears the burden of proof. *Eugene Iovine, Inc.*, 328 NLRB at 294 fn. 2.

with the acquiescence of a predecessor union. The distinction drawn by the Board in this regard is all the more striking because the Board referenced *this Respondent and this bargaining unit* in making the point. In *Courier Journal*, the Board held that an employer's 10-year practice, with the acquiescence of the union, of regularly making unilateral changes in employees' health care program to mirror changes made to the program covering nonunit employees, privileged the employer to continue this practice until the parties bargained to impasse over the subject. 328 NLRB at 1094. In reaching its conclusion, the Board explained that [t]he significant aspect of this case is that the Union acquiesced in [the] past practice," and on this basis distinguished *Eugene Iovine, Inc.*, 328 NLRB 294 (1999), because in

> that case, the past practice of acquiescence was under a different union. Thus, the current union never acquiesced in unilateral changes. Similarly, *NLRB v. Katz*, supra, holds that a newly certified union is not bound to the employer's wholly discretionary pay increases prior to certification.

342 NLRB at 1094. See also *Eugene Iovine*, 328 NLRB at 296.

Thus, looking to the very situation at issue here, the Board in *Courier Journal* cabined application of the past practice doctrine to justify unilateral action by distinguishing situations where the past practice is

based on the acquiescence of a prior union but the "current union never acquiesced in unilateral changes."[7]

This result makes sense. While the Board in *Courier Journal* explained that the past practice exception "is not grounded in waiver," the Board held that "*the* significant aspect of this case is that the Union acquiesced" in the past practice. (emphasis added). Acquiescence necessarily requires a conscience decision by the union to permit the employer action. As explained in *Courier Journal*, this emphasis on acquiescence necessarily precludes application of a past practice based on a prior union's acquiescence to permit unilateral

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7. See also, *Crittenton Hospital*, 342 NLRB 686, 692 (2004) ("even if the Respondent had, in the past, changed the RN's dress code without notifying or consulting with [the previous union], a fact not established here, it was not at liberty, once [the new union] became certified as the RN's new bargaining representative, to continue acting unilaterally regarding changes in RN's dress code or, for that matter, as to any other term and condition of the RN's employment"); *Porta-King Building Systems*, 310 NLRB 539, 543 (1993) (20-year practice of unilateral changes with union does not justify unilateral changes at relocated facility represented by same union as this "is not distinguishable from cases where an employer has claimed the existence of an established past practice in the absence of any prior union relationship"), enfd. 14 F.3d 1258 (8th Cir. 1994) ("As the ALJ observed, 'what the Union did at some other plant at another time as a representative of [different] employees in an altogether different unit obviously cannot be binding on this new unit and the labor organization these employees have chosen to represent them'") (court's bracketing).

changes over the objection of a newly certified union. A union newly arrived on the scene cannot be said to have acquiesced, agreed, or in any way condoned practices permitted by a prior union. Indeed, in many cases employee dissatisfaction with the predecessor union and its practices with the employer may have led to certification of the new union. Assuming, arguendo that Iovine had a past practice that would have privileged unilateral action to lay off employees with Local 363, that past practice cannot privilege the continuation of the practice with the currently certified bargaining representative.[8]

Iovine cites one case, *University of Pittsburgh Medical Center*, 325 NLRB 443 (1998), enfd. mem. 182 F.3d 904 (3d Cir. 1999), involving an employer's defense to a unilateral change allegation that was based on a past practice developed with a predecessor union. However, in that case the Board rejected the employer's defense. Iovine cites the Board's finding that even after a new union was certified, supervisors hired in the past—with the agreement of a predecessor union—to

8. I note Member Schaumber's observation in *Larry Geweke Ford*, 348 NLRB No. 78, fn. 1 (2005) (not reported in Board volumes), that "prior acquiescence of the charging party union is not invariably a requisite element in the past practice analysis." That observation does not, however, conflict with the distinction with *Eugene Iovine, Inc.* drawn in *Courier Journal*, a distinction that precludes an employer from relying on a practice *based on a predecessor union's acquiescence* to impose unilateral changes on mandatory subjects over the objection of a new union.

perform jobs that included bargaining unit work could continue to perform their jobs as they had for many years. However, the practice of performing work that had been removed long ago from the bargaining unit was not an issue in the case. The Board distinguished that practice from the issue that was in dispute: the Board found that the employer could not "remove more bargaining unit work from the unit by creating new supervisory positions to perform such work without bargaining with the Charging Party." In other words, the maintenance of daily work assignments by supervisors and employees based on a removal of bargaining unit work that occurred many years ago was not alleged by the General Counsel to be a new unilateral change in terms and conditions of employment. However, the attempt to add more supervisors to perform more bargaining unit work (of exactly the same type already performed by the previously hired supervisors) was a new unlawful unilateral change, just as in the instant case, each additional layoff consti-tutes a new unilateral change for the formerly working but now laid off employee. Thus, *University of Pittsburgh Medical Center is* consistent with the proposition in *Courier Journal* that once a new union is certified prospective unilateral changes cannot be privileged based on practices developed with a prior union.[9]

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9. Iovine cites three cases where the Board or an administrative law judge agreed that a previously nonunion employer could continue unilateral practices once a union was selected by employees. The cases are all distinguishable because they are not based on the acquiescence of a predecessor

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union. They are also distinguishable on their facts, or are without precedential value. Iovine cites *Kal-Die Casting Corp.*, 221 NLRB 1068 (1975), where the Board, without elaboration, permitted unilateral "routine production scheduling and adjustments relating to diminishing hours of work" based on a past practice developed prior to unionization, but in that case the Board relied upon the fact that no evidence shows "that the Union at any time attempted to broach these issues with Respondent," which is not the case here. Nor are the lay-offs here routine. Respondent cites *Matheson Fast Freight, Inc.*, 297 NLRB 63, 76 (1989), in which the judge found that changes to the starting time of truckdrivers were not a violation, but the Board expressly adopted this finding "pro forma" in "the absence of exceptions," thus negating any precedential value of the finding. *ESI, Inc.*, 296 NLRB 1319 fn. 3 (1989). Respondent cites *Advertisers Mfg. Co.*, 280 NLRB 1185, 1997 (1986), enfd. 823 F.2d 1086 (7th Cir. 1987), however, the Board rejected Respondent's similar reliance upon that case in *Eugene Iovine, Inc.*, supra at 296-297. In *Advertisers Mfg.*, among a "raft of unfair labor practices" (823 F.2d at 1087), including findings of numerous unlawful unilateral changes, the administrative law judge dismissed an allegation that the employer unilaterally reduced hours of work during a 1-year period. As the judge pointed out in *Eugene Iovine*, supra, there is no evidence that exceptions to the Board were taken as to the dismissal of this allegation, calling into question its validity as precedent. See *ESI*, supra. Notably in *Advertisers Mfg.* the Board adopted the judge's finding that the employer's unilateral layoff of employees constituted a violation of Sec. 8(a)(5) of the Act. Clearly, the overwhelming weight of case law supports the view that nonunion employers' past practices will not justify unilateral implementation of mandatory subjects of bargaining once a union represents the employees. See e.g. *Essex Valley Visiting Nurses Assn.*, 343 NLRB 817,843 (2004) ("it is well

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Finally, even without the barrier to Respondent's past practice argument posed by the interposition of a new union, it would be inappropriate under the circumstances to find that its layoffs were a past practice that could be implemented without bargaining. In *NLRB v. Katz*, the Supreme Court rejected the employer's past practice defense to unlawful unilateral implementation of wage raises despite the "the fact that the [ ] raises were in line with the company's long-standing practice of granting quarterly or semiannual merit reviews—in effect, were a mere continuation of the status quo." The Court reached its conclusion because "the raises here in question were in no sense automatic, but were informed by a large measure of discretion." 369 U.S. at 746. The Board's approach to past practice contentions turns on this very point. As explained in *Our Lady of*

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settled that an employer's past practice in effectuating discretionary employment decisions, are no defense to employer's unilateral changes once the Union is certified"); *Mackie Automotive Systems*, 336 NLRB 347, 349 (2001) ("It is well settled that an employer's past practices prior to the certification of a union as the exclusive collective-bargaining representative of the employees do not relieve the employer of the obligation to bargain with the certified union about the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees"); *Eugene Iovine*, 328 NLRB at 296; *Porta-King Building Systems*, 310 NLRB at 543; *Adair Standish Corp.*, 292 NLRB 890 fn. 1 (1989), enfd. 912 F.2d 854 (6th Cir. 1990); *Amsterdam Printing & Litho Corp.*, 223 NLRB 370, 372 (1976), enfd. mem. 95 LRRM (BNA) 3010 (D.C. Cir. 1977).

Lourdes Health Center, 306 NLRB 337, 339-340 (1992), in reasoning the Board has called "controlling:"[10]

> Whether a change is a permissible continuation of the status quo turns on the degree of discretion involved. Thus, in *NLRB v. Katz*, supra at 369 U.S. at 746, the Supreme Court concluded that certain so-called merit raises were unlawful because they were not "automatic raises to which the employer had already committed himself, . . . but were informed by a large measure of discretion." The Court added, at 746-47:
>
> > There simply is no way in such case for a union to know whether or not there has been a substantial departure from past practice, and therefore the union may properly insist that the company negotiate as to the procedures and criteria for determining such increases.
>
> Similarly, in *Garment Workers v. Local 512 v. NLRB*, [795 F.2d 705, 711 (1986)], the 9th Circuit rejected an employer's contention that certain layoffs were lawful because in accordance with established policy. The court noted that economic layoffs "would seem to be inherently discretionary" and that . . . the

10. *EIS Brake Parts*, 331 NLRB 1466, 1467 (2000).

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"long-standing practice" exception suggested in *Katz* placed a heavy burden on the employer to show an absence of employer discretion in determining the size or nature of a unilateral employment change.

Based on the testimony of Respondent's president, it is apparent that the layoffs at issue in this case—while a feature of Respondent's business, and indeed, the construction industry, and based on considerations beyond Respondent's control such as the weather and the progress of other entities in performing assigned work—involve a significant degree of discretion on the part of Respondent's foremen, discretion exercised on an ad hoc basis in each layoff situation. According to the testimony, it is the foremen who assess each situation and determine whether and when to contact Respondent's office to initiate a layoff of employees. Respondent bears the cost of work delays for at least the first day, and pays its employees for showing up for work that day. The foremen then assess whether the delay will likely continue, whether there is other work available, and ultimately, whether a layoff is economically warranted in a particular case. That the prospect of incurring significant costs with no work for employees militate in favor of layoffs—countervailing considerations include having the employees, many of whom are skilled and have the right to seek other work while on layoff, available for upcoming skilled work-makes the decision more not less amenable to collective bargaining. Thus, quite apart from the fact that in this case no past practice with Local 3 can be established,

even without that factor I would not find that Respondent's decisions to lay off employees is immune from bargaining. Respondent's argument is essentially no different than that considered and rejected by the Board in *Eugene Iovine, Inc.*, 328 NLRB at 294, with regard to Iovine's claim in that case that it was free to unilaterally reduce employee hours. The Board explained:

> [a]s the judge found . . . there was no "reasonable certainly" as to the timing and criteria for a reduction in employee hours; rather, the employer's discretion to decide whether to reduce employee hours "appears to be unlimited." The Board and the courts have consistently held that such discretionary acts are, as stated by the judge, "precisely the type of action over which an employer must bargain with a newly-certified Union."

In this case, each decision to lay off employees requires foremen to exercise similar discretion to determine whether a layoff is warranted. It is precisely the type of employer action to which the statutory duty to bargain applies.[11]

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11. The record does not reveal whether Iovine's layoff practice with Local 363 was based only on contractual agreements between the parties, or also on continuation of the practice during hiatus periods between contracts. In *Courier Journal* the practice of unilaterally implementing health insurance program changes was maintained consistently during (Cont'd)

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Respondent also contends that its policy of unilaterally laying off employees does not violate the Act because the layoffs are based on "compelling economic considerations" that exempt Respondent from the duty to bargain over layoffs.

Respondent's argument, which would appear to apply generally to the construction industry, is founded on the recognition in Board cases such as *RBE Electronics*, 320 NLRB 80 (1995), and *Bottom Line Enterprises*, 302 NLRB 373 (1991), that "there are certain compelling economic considerations that the Board has long recognized as excusing bargaining entirely about certain matters." *RBE Electronics*, supra at 81. Respondent bears a "heavy burden"[12] in making this defense, as "[t]he Board has limited its definition of these considerations to 'extraordinary events which are

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hiatus periods between contracts and thus without regard to whether a contract waiving the right to bargain over the practice was in effect. Given my rejection of Iovine's past practice defense on other grounds, I do not reach the issue of whether a past practice defense requires a showing that the practice continued after expiration (or in the absence) of labor agreements and therefore in the absence of a contractual waiver. See, *Register-Guard*, 339 NLRB 353, 356 (2003) (employer's past changes, "implemented under a contractual provision that has since expired, do not establish a past practice allowing the [employer] to implement [without bargaining]").

12. *Broadway Volkswagen*, 342 NLRB 1244, 1257 (2004); *RBE Electronics*, supra at 81, citing *Our Lady of Lourdes Health Center*, 306 at 340 fn. 8.

an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.'" *RBE Electronics*, supra at 81, quoting *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995) (Board's bracketing) (internal quotations omitted). "Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action." *RBE Electronics*, supra at 81 (footnotes omitted).

Iovine attempts to jettison the duty to bargain over layoffs based on the fact, discussed supra, that in the construction industry the ability to perform work is subject to unpredictable events such as inclement weather, the failure of other contractors to timely perform their portion of a construction project, and the unexpected lack of support services. Because of the obvious cost to the employer of paying employees for "just hanging around" (Tr. 70), Respondent's foremen will order a layoff of employees if the delay and lack of other work make the layoff economically warranted. Notably, the 18-month period spanned by the complaint allegations in this case involve layoffs occurring on a total of 11 days. As discussed, supra, there is no evidence that layoffs occurred at all in the initial years after Local 3 became the bargaining representative, and the stipulated finding in *Eugene Iovine, Inc.*, 328 NLRB at 296, 297, is that reassignment of employees to other jobsites was a common alternative to layoffs. Thus, unanticipated interruptions requiring layoffs are not so common that they are occurring every day, or week, month, or even every year.

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Respondent's argument, which if accepted would vitiate the duty to bargain over layoffs in this case, the construction industry generally, and any other industry where production and work opportunities are subject to occasional interruption, does not satisfy the Board's requirements as discussed in *RBE Electronics.* See *Mackie Automotive Systems,* 336 NLRB at 349 ("Respondent cites no case in support of its proposition that the reduced demands of an employer's customer—even its only customer—permit the employer simply to skip bargaining with its employees' collective-bargaining representative and to unilaterally change its employees' terms and conditions of employment. Thus, we also agree with the judge that the fact that this unilateral change was prompted by a bona fide scheduling change implemented by [respondent's sole customer] does not excuse the Respondent from its obligation to bargain with the Union.").

The layoffs that Respondent feels compelled to undertake are, by Respondent's own description, a predictable characteristic of its work environment. The need for any particular layoff may arise in short order but the general issue can be and is anticipated by Respondent, and is eminently suitable to collective bargaining. It is not unreasonable to expect Respondent to bargain in advance for an arrangement that deals generally with Respondent's obligations when laying off employees. And even the specific layoffs, which are undertaken at a foremen's discretion, could be delayed for at least some period of time while Respondent notifies and offers the Union an opportunity to bargain

to impasse over the subject. In this regard, I believe that under the circumstances of this case, the layoffs at issue would fit within the situation the Board described in *RBE Electronics,* supra at 82, where an employer faced with economic exigencies that cannot await the achievement of a collective-bargaining agreement or an overall bargaining impasse, may satisfy its statutory obligation by providing the union with adequate notice and an opportunity to bargain. Once it does so, the employer can act unilaterally if the union fails to act promptly to request bargaining or the parties reach good-faith impasse, and the Board has recognized that under such circumstances the bargaining need not be protracted. Id. This exception to the general duty to reach agreement on a new collective-bargaining agreement or overall impasse before implementing changes addresses Respondent's concerns over unexpected interruptions of work. But in this case, Respondent does not claim to (and cannot) rely on this limited exception to the general duty to bargain as it did not provide the Union with notice of the lay-offs in time to permit discussion and counterproposals prior to the implementation of the layoffs. *Eugene Iovine,* supra at 297.

Notably, the expense to Respondent of delaying layoffs so that bargaining could occur is described by Respondent as an expense in wages and benefits, subjects, of course, that are central to the duty to bargain. A union that could not accom-modate an employer's legitimate economically motivated de-sire to order sudden layoffs might find that the added cost to

the employer would one day be incorporated into a proposal for wage and benefit reductions. But—based on first principles—that is not a choice that the Board should make for a union or employer. One can imagine a union being willing to sacrifice wages and benefit premiums to ensure full employment for its members. On the other hand, a union might well (as Local 363 apparently did) seek an agreement that permits the employer flexibility with regard to layoffs in exchange for other bargaining objectives. But it does not comport with Act's indifference toward substantive outcomes of bargaining to remove layoffs from the ambit of collective bargaining because of the added wage and benefit costs that employers may incur from having to take time to bargain over layoffs. Employers and unions can negotiate a solution to this problem as they do in other areas relating to wages, hours, and terms and conditions of employment.

Finally, Respondent also contends that, even if it had a duty to notify and bargain with Local 3 regarding its decision to lay off employees, the notice it gave (in those instances where it provided notification) was adequate under the circumstances prevailing in its industry. In other words, Respondent contends that if the circumstances of the construction industry do not exempt it altogether from bargaining over the decision to lay off employees, they permit notification as a fait accompli. This argument misconstrues the point of the statutory duty to bargain which, as discussed supra, is thwarted by presentation to the union of a fait accompli on the issue to be bargained. Even when the Board

requires a union to accommodate economic exigencies faced by an employer and bargain in haste *(RBE,* supra at 82), notice after-the-fact is inadequate. As the Seventh Circuit explained in *Advertisers Mfg.,* supra at 1090:

> The rule that requires an employer to negotiate with the union before changing the working conditions in the bargaining unit is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them. . . . Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective-bargaining agreement it sends a dramatic signal of the union's impotence.

Acceptance of Respondent's argument would vitiate the duty to bargain and in that sense it is a repackaged version of Respondent's assertion that it has no duty to bargain. I reject the contention that Respondent's duty to bargain over layoffs is limited to a duty to provide the union with a fait accompli for the same reasons I reject its claim that it has no duty to bargain over layoffs.

Respondent has violated Section 8(a)(1) and (5) of the Act, as alleged, by laying off bargaining unit

employees without providing advance notice to the Union to afford it a meaningful opportunity to bargain over the layoffs.

CONCLUSIONS OF LAW

1. Respondent is, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since February 23, 1993, the Union has been the certified exclusive collective-bargaining representative, within the meaning of Section 9(a) of the Act, of an appropriate unit of employees, composed of:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field who are employed by employer-members of the United Electrical Contractors Association, a/k/a United Construction Contractors Association, but excluding all office clerical employees, guards and supervisors as defined in the Act.

4. By unilaterally laying off bargaining unit employees without timely notifying the Union and providing a meaningful opportunity to bargain over the decision to lay off employees and the effects of the

layoffs, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act.

5. The unfair labor practices committed by Respondent affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Respondent shall be ordered to provide advance notice to its employees' bargaining representative of layoffs undertaken for economic reasons, and upon request, to bargain over decisions to lay off employees, and to bargain over the effects of such layoffs, and to the extent it has not already done so, Respondent shall offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

William Alleyne	John Betancourt	Greg Stafford
Hugh Oakley	Peter Capasso	Lenford Anderson
Leslie Thomas	Mike Matone	Salvatore DePetro
Anthony Longo	Wayne Munyon	Clifford Pelzer

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Charlie Sarullo	Phil Spannagel	William Grady
Gary Schulz	Ararson Medrano	Louis Cordero
Ed Wellington	Phil Nola	Russell Sausa
Allen Tu	Mario Thalassinos	John Siano
Jose LaSalle	Glen Lillibridge	Robert Lock
Edward Shane	Richard Zeller	Derrick Robinson

Respondent shall be ordered to make whole these employees and other similarly situated employees for any loss of earnings or other benefits they may have suffered by reason of the Respondent's unlawful layoff of employees, to the date of rein-statement, in the manner prescribed in *Ogle Protection Services*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Respondent contends that the remedy in this case for any violation found should be analogous to the limited back pay remedy ordered in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968). However, in cases, such as the instant case, involving a violation of the duty to bargain over the decision to undertake layoffs, the Board has consistently rejected such arguments. *Pan American Grain Co.*, 343 NLRB 318 (2004) (rejecting limited *Transmarine* remedy for the failure to bargain over the decision to lay off employees and finding "that

the full backpay and reinstatement remedy is appropriate");[13] *Plastonics, Inc.*, 312 NLRB 1045 (1993) ("The traditional and appropriate Board remedy for an unlawful unilateral layoff based on legitimate economic concerns includes requiring the payment of full backpay, plus interest, for the duration of the layoff."); *Lapeer Foundry*, 289 NLRB at 955-956; *Wilen Mfg.*, 321 NLRB 1094, 1100 (1996). Respondent's argument, essentially that the injury was a delay in receiving notice of the layoffs, misconceives the violation. As the Board in *Porta-King Building Systems*, 310 NLRB 539-540 (1993), explained,

> had the Respondent acted lawfully, it would have provided the Union with an opportunity to bargain *before* changing employee terms of employment. An offer to bargain over layoffs *after* they have occurred is no substitute for such prior notice. Once the layoffs have taken place and unit jobs lost, the union's position has been seriously undermined and

13. The First Circuit Court of Appeals remanded the Board's remedial order in *NLRB v. Pan American Grain*, 432 F.3d 69 (1st Cir. 2005), for reasons not at issue here. The court agreed that a full backpay remedy is warranted where the decision to bargain about layoffs is a mandatory subject of bargaining, but the court sought further explanation of whether a decision to lay off employees because of the employer's modernization project was such a mandatory subject. In the instant case, Iovine's decision to lay off employees, which was indisputably prompted by economic reasons, is a mandatory subject of bargaining.

> it cannot engage in the meaningful bargaining that could have occurred if the Respondent had offered to bargain at the time the Act required it to do so. Indeed, in cases involving unlawful unilateral changes, the Board's normal remedy is to order restoration of the status quo ante as a means to ensure meaningful bargaining, and this policy has been approved by the Supreme Court. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964). Therefore, we find that the Respondent's offer to bargain about the layoffs after they occurred is insufficient to "undo the effects of [the violation] of the Act," *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953), and does not toll the Respondent's backpay liability. [Board's Emphasis.]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

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14. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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ORDER

The Respondent, Eugene Iovine, Inc., Farmingdale, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally laying off employees for economic reasons in the bargaining unit represented by Local 3, International Brotherhood of Electrical Workers, AFL-CIO, the exclusive representative of the employees, without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees and the effects of the layoff. The bargaining unit is:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field who are employed by employer-members of the United Electrical Contractors Association, a/k/a United Construction Contractors Association, but excluding all office clerical employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action which is necessary to effectuate the polices of the Act.

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(a) Before implementing any layoff of bargaining unit employees for economic reasons notify and, on request, bargain with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO as the exclusive collective-bargaining representative of employees in the bargaining unit, over the layoff decision and the effects of the layoff.

Within 14 days from the date of this Order, to the extent that it has not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed:

William Alleyne	John Betancourt	Greg Stafford
Hugh Oakley	Peter Capasso	Lenford Anderson
Leslie Thomas	Mike Matone	Salvatore DePetro
Anthony Longo	Wayne Munyon	Clifford Pelzer
Charlie Sarullo	Phil Spannagel	William Grady
Gary Schulz	Ararson Medrano	Louis Cordero
Ed Wellington	Phil Nola	Russell Sausa
Allen Tu	Mario Thalassinos	John Siano
Jose LaSalle	Glen Lillibridge	Robert Lock
Edward Shane	Richard Zeller	Derrick Robinson

(c) Make whole the unit employees named above in subparagraph 2(b), and other similarly situated employees, for any loss of earnings and other benefits they may have suffered as a result of Respondent's unilateral lay off of employees without providing the Union with timely notice and an opportunity to bargain about the decision to lay off employees, in the manner set forth in the remedy section of the decision.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

Within 14 days after service by the Region, post at its facility in Farmingdale, New York copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained

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15. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 1, 1996.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 31, 2006

Appendix B

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT lay off of you in the bargaining unit for economic reasons without first giving notice to Local 3, International Brotherhood of Electrical Workers, AFL-CIO, and providing Local 3 with an opportunity to

bargain about the layoff decision and its effects. The bargaining unit is:

> All electricians, electrical maintenance mechanics, helpers, apprentices and trainees employed in the electrical field who are employed by employer-members of the United Electrical Contractors Association, a/k/a United Construction Contractors Association, but excluding all office clerical employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to them by Section 7 of the Act.

WE WILL notify and on request bargain with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO before we implement a layoff of any of you for economic reasons.

WE WILL, within 14 days from the date of this Order, to the extent that it has not already done so, offer the following employees and other similarly situated employees immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss suffered as a result of their unlawful layoff.

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William Alleyne	John Betancourt	Greg Stafford
Hugh Oakley	Peter Capasso	Lenford Anderson
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Edward Shane	Richard Zeller	Derrick Robinson

EUGENE IOVINE, INC.